

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Richard J. Schwab, Esq. (Bar No. 72566)
Trygstad, Schwab & Trygstad
1880 Century Park East, Suite 1104
Los Angeles, California 90067-1600
Telephone: (310) 552-0500
Facsimile: (310) 552-1306

Attorneys for Respondents

BEFORE THE GOVERNING BOARD OF
LOS ANGELES COUNTY OFFICE OF EDUCATION

In the Matter of the Accusation against
Certificated Staff of Los Angeles County Office
of Education,
Respondents.

Case No. 2014020972

CLOSING ARGUMENT

[Government Code §11509; Ed. Code
§44949(c)(1)]

Hearing Date: April 17-18, 2014
Time: 9:00 a.m.
Place: District Office
9300 Imperial Highway
Downey, CA 90242

Respondents, mostly represented by Los Angeles County Educators Association (LACEA), submit this closing argument to challenge the Los Angeles County Office of Education’s (LACOE) retention of junior employees by laying off senior employees who are certificated and competent to teach at Christa McAuliffe, at Camp Challenger, Road to Success at Scott Scudder and Pace School. Also to assure inclusion within the proposed decision that pursuant to the oral stipulation there will be a corresponding number of rescissions of Respondents related to vacancies which will result from assured attrition in the following months. (See Exhibits 2, F and stipulation at hearing). Lastly by admission of LACOE Witnesses all Respondents, even those served “precautionary notices” are deemed to be probationary or permanent which entitles them the employment priorities under Education Code sections 44956 and 44957.

1 **I. Summary of Argument**

2 It is well recognized that when it is necessary to layoff teachers or other certificated
3 employees, California law requires that layoff be done in reverse seniority order. Senior employees
4 who are certificated and competent shall be retained over junior employees with the same
5 qualifications. (See Education Code § 44955 subd. (b)) However, like most rules, there is an
6 exception:

7 “A school district may deviate from terminating a certificated
8 employee in order of seniority [if it] demonstrates a specific need for
9 personnel to teach a specific course or **course of study**...and that the
10 certificated employee **special training and experience** necessary to
teach that course or course of study...which others with more
seniority do not possess.” (See Education Code § 44955 subd. (d)(1);
emphasis added)

11 As was discussed at the hearing, LACOE failed to properly apply this exception when it
12 retained junior employees without demonstrating their special training or experience. In the absence
13 of any proof related to any of the proposed “skipped” junior employees training or experience,
14 Respondents’ must be retained because they are more senior employees who are “certificated and
15 competent” under subdivision (b) of Education Code section 44955. (See *Bledsoe vs Biggs Unified*
16 *School District* (2008) 170 Cal App. 4th 127)

17 LACOE’s attempt to exempt Skipped junior employees at McAuliffe, Road to Success and
18 Pace from layoff **without meeting its burden** to demonstrate the special training or experience of
19 any of any of the junior Respondents is based upon a preference, not special training and expertise
20 necessary to teach that course or course of study in those facilities and does not constitute a basis
21 under law to deviate from seniority. (See *Alexander v. Board of Trustees of Delano Joint Union*
22 *High School District* (1983) 139 Cal.App.3d 567)

23 **II. LACOE’S RESOLUTION TO EXEMPT OR SKIP FROM LAYOFF ALL**
24 **INDIVIDUALS SERVING IN MCAULIFFE AND ROAD TO SUCCESS IN THE**
25 **2014-2015 SCHOOL YEAR IS NOT SUPPORTED IN THE RECORD**

26 To implement the layoff, LACOE adopted resolutions which decided to exempt or “skip”
27 from all layoffs all individuals teaching at McAuliffe and Road to Success for the 2014-2015 school
28 year. The effect of this resolution is that regardless of seniority, employees at the above schools

1 would not be laid off. However, no senior employee who is certificated and competent as defined in
2 subdivision (b) of Education Code section 44955 can be laid off unless LACOE meets its burden to
3 establish not only a “special need,” but also the junior certificated employee being skipped actually
4 possesses the special training needed and has experience necessary to teach that course of study at
5 McAuliffe and Road to Success at Camp Scudder Scott. NO SUCH EVIDENCE WAS
6 PRESENTED IN THE HEARING. Senior Respondents who testified, Edpao (533), Hong (536),
7 McNamara (577)¹, Gray (411). Burns(435), Reed (516) and Ivey (438) coupled with the testimony
8 of County witness Magnunson and LACEA witness Christian demonstrated that there were many
9 Respondents who were senior and certificated to serve at McAuliffe and Road to Success yet were
10 being laid off. As stated earlier, the rule is that seniority and credentialing must be applied and the
11 exception allows for deviation only when the burden of proof has been met. LACOE does not have
12 the authority or power based upon preference to retain junior employees over those who are senior
13 certificated employees and who are certificated and competent as set forth under subdivision (b) of
14 the Education Code section 44955.

15 LACOE’s assertion that the programs and techniques used at those schools are special
16 within the meaning of Education Code § 44955 subd. (d)(1) is belied by the fact that Road to
17 Success is a franchise program in which most Respondents are being trained under grants at other
18 juvenile court facilities. The testimony of Edpao, Hong, McNamara and Christian confirm this fact.
19 Also the County witnesses corroborated that the same course of studies (block schedules,
20 professional learning communities, building relationships with students, evaluations, training to
21 transition students from the juvenile incarceration to community, P.B.I.S., staff summits and
22 meetings, embedded interdisciplinary trainings/teaching, math and specialized reading programs)
23 were being offered with the same type of population of students. LACOE further argues that
24 because of subdivision (d) of Education Code §44955, it allows LACOE to deviate from seniority in
25 its layoff because it allegedly demonstrates a need for personnel to teach that “specific...course of
26

27 _____
28 ¹ Respondent McNamara (577), aside from being qualified to bump into skipped employee 612,
may also have bumping rights relating to employee 582.

1 study.” However, the evidence showed a preference and not “a course of study.” The course of
2 study at McAuliffe and Road to Success are fundamentally the same as all Juvenile Court Schools.
3 Thus, the training which is offered to the junior employees at McAuliffe and Roads to Success are
4 not unique, but preferred at those campuses.

5 LACOE’s argument that there was a lawsuit filed against the County Office of Education
6 which mandated McAuliffe, Road to Success and Pace to comply with constitutional standards is
7 applicable to all schools. However, as will be observed, the settlement which was reached by and
8 between the Plaintiffs and LACOE did not specify particular employees who should be retained, but
9 rather that certain standards should be followed to assure that the constitutional guarantees of an
10 equal education are provided to those who are residents and/or students who attend said juvenile day
11 camps. There is nothing in the settlement or agreement which mandates that junior employees
12 should be retained, or that Education Code section 44955 seniority based layoffs should be ignored.
13 Rather the Court order requires that anyone who is going to be working at the County comport with
14 the Court agreement. It should be noted that constitutional equal protection applies to all schools
15 under the jurisdiction of LACOE.

16 It is well established that in a layoff analysis it must be determined whether the employee
17 who is senior is certificated and competent (see Education Code§ 44955 subd.(b))². Since the
18 inception of layoffs, district and county school have been required to layoff employees based on
19 seniority, as long as the senior employee is certificated and competent. (See *Davis v. Gray* (1938)
20 29 Cal.App.2d 403) For example, in order to teach a subject, one must have a particular credential.
21 Here, all of the senior employees being laid off are certificated to teach at the aforementioned
22 schools, yet they have been denied their rights based upon their seniority. If, in contrast, the more
23 senior employees do not have the appropriate certification, the County Office of Education only
24 then may retain the more junior employee needed to teach that subject. (See *Duax v. Kern*
25 *Community College District* (1987) 196 Cal.App.3d 555)

26
27
28 ² LACOE (Ex. 2, P. 29) had no definition of competence applied to Respondents who are
certificated and senior and are competent. (See *Alexander v. Board of Trustees, supra*)

1 Once it has been established that the senior employees are certificated then the next issue is
 2 whether said employee who is senior is competent within the phrase “certificated and competent” in
 3 section 44955 of the Education Code. In *King v. Berkeley Unified School District* (1979) 89
 4 Cal.App.3d 1016, the Court of Appeal upheld a school district’s decision in retaining a teacher who
 5 had specialized knowledge or ability in a particular subject matter where the more senior individuals
 6 did not. Similarly, in *Duax v. Kern Community College District, supra*, the Court interpreted the
 7 phrase “competent” to allow the District to retain a junior psychology instructor, where a more
 8 senior psychologist had not actually taught in the last ten years.

9 In this instant case, all of the senior employees have the appropriate certification to be able
 10 to teach at a juvenile day camp school along with the competency and recency. Thus, there is no
 11 dispute that the senior employees are both certificated and competent and therefore should be
 12 retained.

13 **III. LACOE’S RELIANCE UPON *BLED SOE V. BIGGS UNIFIED SCHOOL DISTRICT***
 14 **IS MISPLACED AND THEREFORE DOES NOT ALLOW FOR DEVIATION FROM**
 15 **SENIORITY**

16 LACOE urged that under the decision of *Bledsoe v. Biggs Unified School District* (2009)
 17 170 Cal.App.4th 127, a school district or county office of education may deviate from seniority in
 18 layoffs based upon a junior employee’s special training and experience to teach a “course of study”
 19 pursuant to Education Code § 44955 subd. (d). In theory this is accurate. However, it should
 20 further be observed that before the Administrative Law Judge and Courts allowed for the deviation
 21 there was detailed testimony by the superintendent meticulously identifying each of the skipped
 22 employees special training, experience and uniqueness of the Community school in contrast to the
 23 main stream schools in that District. Here, no such evidence was presented. (emphasis added).
 24 Thus in the absence of said evidence to meet the burden that deviation was necessary, the law
 25 requires that seniority based layoffs in which a Respondent is certificated must be followed.

26 Also in *Bledsoe, supra*, that decision never explicitly interpreted the phrase “course of
 27 study” in section 44955 of the Education Code, but only recognized that a school district may have
 28 “special needs for personnel to teach a specific course of study that go beyond base qualifications.”

1 Here, the distinction of the *Bledsoe, supra* case is that the McAuliffe, Road to Success and Pace as
2 discussed have the same course of study.

3 In other words, the content and course of study remained the same, but the teachers were
4 mandated in the Court settlement to meet such requirements as arriving to school on time, not
5 leaving the students unattended, implementing appropriate disciplinary procedures and formulating
6 a curriculum which was compatible with a particular student's age and level of ability. The
7 Respondents being laid off have same or similar experience working with the population of juvenile
8 court students. (Testimony of Edpao, Hong, Christian) The legislative history of Education Code §
9 44955 supports that while there may be deviation from seniority, it should be narrowly construed so
10 that the essence of layoffs is not based upon nepotism or selectivity of teachers that the County
11 Office of Education prefers. (*Bledsoe vs Biggs, supra*)

12 **IV. LACOE BEARS THE BURDEN OF PROOF AND HAS FAILED TO**
13 **DEMONSTRATE THAT THE RESPONDENTS WHO ARE MORE SENIOR**
14 **SHOULD NOT BE RETAINED**

15 The inquiry in a layoff when a school district attempts to deviate from seniority that they
16 must not only present evidence of trainings or experiences required in order to teach the class, but
17 also that specific certificated employees with less seniority actually possess those special trainings
18 and experience. Here, we do not know if any of the teachers LACOE intends and/or desires to
19 retain are qualified as educators, maintain HOLL certifications, or if embedded in their training is
20 the knowledge of how to provide the services required by McCauliffee or Road to Success
21 Academy.

22 LACOE has the obligation to demonstrate that skipped juvenile day camp employees have
23 special training and experience necessary to teach the "course of study." (See *Bledsoe v. Biggs*
24 *Unified School District, supra*) As stated in *Bledsoe, supra*, "in order to retain certificated
25 employees under section 44955 subd.(d)(1)...a district must...establish the certificated employee it
26 proposed to retain has special training experience necessary to teach that course or course of
27 study..."

28 Here, as already demonstrated, the evidence shows that many of the Respondents have

1 received the same training or have the exact same experience as those who are being retained who
2 are junior to them. LACOE totally ignores those senior employees because they are not at a
3 particular school or camp site which has been exempted from layoff. However, they have the same
4 training and experience or that which is very similar. Thus, it is clear that under Education Code
5 §44955, there is no exception or exemption which allows less senior teachers to be retained when
6 there are more senior Respondents who are certificated and competent to perform the same services
7 for which the junior employee is being retained. This is fundamental to the enforcement of the
8 Education Code and layoff provisions relating to certificated employees.

9 Thus, while *Bledsoe, supra* does allow deviation from seniority under unique circumstances,
10 it is not as County Office of Education urges to allow for the wholesale corruption of seniority.
11 *Bledsoe, supra* is the exception and not the rule.

12 Therefore, the County Office of Education has failed to establish that the alleged training
13 and experience is necessary (in contrast to preferable) for the course of study being applied at the
14 three exempted sites.

15 **V. LACOE IS IMPROPERLY SKIPPING EMPLOYEE NUMBER 572 (DIEM**
16 **JOHNSON), WHEN SHE IS NOT SERVING IN A TEACHING POSITION AS A**
17 **LITERARY SPECIALIST, BUT RATHER AS A MANAGEMENT PROGRAM**
18 **SPECIALIST**

19 It is undisputed that employee 572, Ms. Johnson, is serving as a management program
20 specialist and not a literary specialist teacher as set forth in Exhibit 3, the Certificated Seniority List.
21 Accordingly, LACOE has presented no evidence that any teacher is filling on a temporary or
22 substitute basis at the Road to Success Academy in the position of literary specialist. Therefore, as a
23 matter of law, there exists a vacancy which a more senior, certificated employee could serve.
24 (Testimony of Edpao and Hong)

25 Section 44955 of the Education Code, commonly referred to as the “economic” layoff statute
26 (See *Cousins v. Weaverville Elementary School District* (1994) 24 Cal. App.4th 1846), provides in
27 pertinent part at subdivision (b) that no permanent employee may be terminated under the
28 provisions of this section while any other employee with less seniority is retained to render a service

1 which said permanent employee is certificated and competent to render. Here, there is no basis in
2 which to “skip” employee 572, because she is not even serving in the position which is being
3 protected. Moreover, there is nothing in the resolution which allows skipping an employee not
4 serving in a teaching position. Essentially, LACOE is permitted to “save” a position which is not
5 being occupied by the junior employee being skipped, but this provides an added protection which
6 is neither envisioned, nor allowed, under the Education Code. Our California Supreme Court has
7 set forth a mandate for a statutory interpretation of Education Code § 44955, only allowing skipping
8 for those junior employees who are actually serving in the position that is being retained. As stated
9 in *Coalition of Concerned Communities v. City of Los Angeles* (2004) 34 Cal.4th 733, 737, “if the
10 [statutory] language is clear, courts must generally follow its plain meaning unless a literal
11 interpretation would result in absurd consequences the legislature did not intend.” It would be
12 absurd to retain a junior employee who is not serving in a teaching position and then save that
13 position while another certificated, senior employee is losing his or her job. Accordingly, the most
14 senior credentialed teacher, who is certificated as a literary specialist, should be able to “bump” into
15 the position in which employee 572 is no longer serving. (See *Alexander v. Board of Trustees of*
16 *Delano Joint Union High School District* (1983) 139 Cal.App.3d 567).

17 **A. TESTIMONY OF LACOE WITNESSES ESTABLISH THAT RESPONDENTS**
18 **WITH GREATER SENIORITY AND CREDENTIALING COULD TEACH AT**
19 **MCCAULIFFEE AND ROAD TO SUCCESS ACADEMY**

20 During the testimony of Ms. Magnunson, she established by her testimony and expertise that
21 the Respondents who are senior to those being skipped or retained possessed the requisite
22 credentials and seniority to be able to “bump” into those positions which are being inappropriately
23 held by the junior employees. This is not to attack the credibility and/or excellence of either those
24 being retained in contrast to those who are being unlawfully laid off. Rather, there is no evidence to
25 establish either is more qualified than the other. Thus, under California law pursuant to Education
26 Code §44955, the rule must be followed before an exception may be made is that “no permanent
27 employee may be terminated under the provisions of this section while any other employee with less
28 seniority, is retained to render a service which said permanent employee is certificated and

1 competent to render”.

2 There being no evidence to establish that those being retained possess any special trainings
3 and/or experience necessary to teach a course of study at either McCauliffee and/or Road to Success
4 Academy, as a matter of law, those senior employees who are certificated and competent under
5 subdivision(b) of §44955 of the Education Code must be retained.

6 **B. ALL RESPONDENTS SERVED, INCLUDING THOSE SERVED**
7 **PRECAUTIONARY NOTICES, ARE DEEMED TO HAVE EMPLOYMENT**
8 **PROTECTION PURSUANT TO EDUCATION CODE §§ 44956 AND 44957**

9 During the testimony of D. Magunson, it is undisputed that all Respondents, including those
10 served precautionary notices, were deemed to be probationary for all purposes. Therefore, pursuant
11 to Education Code § 44956 and § 44957, they must be given employment priority if they are in fact
12 laid off.

13 **VI. LACOE HAS AGREED AND STIPULATED THAT IT WILL RESCIND THE**
14 **CORRESPONDING NUMBER OF RESPONDENTS BASED UPON ASSURED**
15 **ATTRITION**

16 As set forth in Exhibit F, there will be an anticipated teacher voluntary separation of 23
17 fulltime equivalents. Several of those identified in Exhibit F are individuals who are not
18 Respondents in this instant case. Among those who will be voluntarily separating, they will do so
19 within the months of June through August 2014. It is therefore requested that in the Proposed
20 Decision, the stipulation guaranteeing that there will be a corresponding number of rescissions as to
21 those Respondents who will be assigned to those positions which will become vacant due to the
22 voluntary separations.

23 **VII. CONCLUSION**

24 All that Respondents ask is that if there must be layoffs, that they be implemented
25 objectively and fairly. Here, there has been no showing of any special training or experience, but
26 rather, generalized testimony relating to the McAuliffe and Road to Success which is insufficient to
27 justify skipping as set forth in *Bledsoe v. Biggs, supra*. Respondents must be retained based upon
28 their seniority and credentialing.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: April 28, 2014

TRYGSTAD, SCHWAB & TRYGSTAD

By: /s/ Richard J. Schwab

RICHARD J. SCHWAB
Attorneys for Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen (18) and not a party to the within action; my business address is 1880 Century Park East, Suite 1104, Los Angeles, CA 90067. On April 28, 2014, I served the foregoing document(s) described as CLOSING ARGUMENT on all interested parties to this action by delivering

a copy an original
thereof in a sealed envelope addressed to each of said interested parties at the following address(es):

Vibiana M. Andrade
Jennifer Williams
Los Angeles County Office of Education
9300 Imperial Highway, EC-299
Downey, CA 90242
Attorneys for Petitioner

(BY MAIL) I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our firm's office address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

(BY E-MAIL SERVICE) I caused such document to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.

(BY OVERNIGHT COURIER) I served the foregoing document by FedEx, an express service carrier which provides overnight delivery, as follows: I placed true copies of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided for.

(BY FAX) I caused the above-referenced document to be transmitted to the interested parties via facsimile transmission to the fax number(s) as stated above.

(BY PERSONAL SERVICE) I personally delivered such envelope by hand to the offices of the above named addressee(s).

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on April 28, 2014, at Los Angeles, California.

/s/ Holly Manzo
Holly Manzo